AKAIWA CORPORATION (M) SDN BHD

v.

OOI WOON CHEE

HIGH COURT MALAYA, KUALA LUMPUR
LEE HENG CHEONG JC
[ORIGINATING SUMMONS NO: 24NCVC-1019-06-2013]
12 NOVEMBER 2013

COMPANY LAW: *Winding up - Undue preference - Tenancy agreements entered as means to settle part of wound up company's debts - Whether tenancy agreements executed less than six months prior to commencement of winding up - Whether tenancy agreements void against liquidator as undue preference - Bankruptcy Act 1967, s. 53 - Companies Act 1965, s. 293*

The company was the registered owner of six units of premises which were let to the plaintiff pursuant to six tenancy agreements dated 15 June 2011 and 16 June 2011 ('tenancy agreements'). The company was wound up on 22 June 2012 and the court appointed the defendant as the liquidator. It was the plaintiff's contention that the tenancy agreements were the means by which the company proposed to settle part of its debt allegedly due from the company to the plaintiff. The plaintiff filed the suit against the defendant for various reliefs but had subsequently withdrawn its claim against the defendant. However, the defendant, pursuant to O. 28 r. 7(2) of the Rules of Court 2012, gave a notice of his intention to lodge a counterclaim against the plaintiff for an order that the tenancy agreements were void against the defendant as the liquidator of the company as an undue preference. The defendant contended that the tenancy agreements were entered into within six months before the commencement of the winding up of the company and was thus caught by s. 53 of the Bankruptcy Act 1967 read together with s. 293 of the Companies Act 1965 ('CA').

Held (allowing defendant's counterclaim):

(1) The relevant date for the purpose of determining whether the payment or the tenancy agreements constituted undue preference could not be 4 May 2011, which was the date of

A the company's letter to the plaintiff proposing to settle part of its debt to the plaintiff by leasing the premises to the plaintiff. The relevant dates were 15 June 2011 and 16 June 2011 which were the dates of the tenancy agreements and also the dates when the payment was deemed to have been made.
B The tenancy agreements were void for undue preference as the dates of its execution were less than six months prior to the commencement of the winding up of the company. (paras 12-14)

C **(2)** In this light, the court granted an order pursuant to s. 293 of the CA read together with s. 53 of the Bankruptcy Act 1967 that the tenancy agreements between the plaintiff and the company and/or the payments made or deemed to have been made by the company to the plaintiff pursuant to the tenancy
D agreements were void as against the liquidator of the company. (para 16)

Case(s) referred to:
G & M Aldridge Pty Ltd v. Walsh [2001] 179 ALR 416 ***(foll)***
Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding
E *Industries Sdn Bhd [1998] 4 CLJ 557 FC* ***(foll)***
Khaw Poh Chhuan v. Ng Gaik Peng & Ors [1996] 2 CLJ 185 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 53(1)
Companies Act 1965, ss. 219(2), 293
F Rules of Court 2012, O. 28 r. 7(2)

For the plaintiff - Chiang Woei Chien; M/s Chiang Chambers
For the defendant - Wan Nurshafina Wan Mohd Samsudin (Wong Chee Lin with her); M/s Skrine

G *Reported by S Barathi*

JUDGMENT

Lee Heng Cheong JC:

H **Introduction**

[1] The plaintiff filed this suit against the defendant for various reliefs and pending the determination of the plaintiff's originating summons, the plaintiff applied for an *ex parte* injunction against the
I defendant which was later set aside by the defendant.

[2] At the hearing on 25 June 2013, the plaintiff through its counsel, withdrew its claim against the defendant with no order as to costs. The defendant in his affidavit in support affirmed on 20 June 2013 pursuant to O. 28 r. 7(2) of the Rules of Court 2012, gave notice of his intention of lodging a counterclaim against the plaintiff for an order that the tenancy agreements of the various premises referred to, in para. 4 of the plaintiff's 1st affidavit, are void against the defendant as liquidator of the company as an undue preference. Thus what is outstanding is the determination of the defendant's counterclaim.

[3] The defendant is the court appointed liquidator of HSL E & E Corp. (M) Sdn. Bhd. ("the company") and was appointed as liquidator of the company in place of the official receiver '("OR") by the High Court of Kuala Lumpur in Companies (Winding Up) Petition No. 28NCC-1051-12/2011 on 16 October 2012. The company was earlier wound up on 22 February 2012 upon the winding up petition presented by Gintell (M) Sdn. Bhd. on 13 December 2011. The company is registered owner of six units of premises at Pandan Perdana in Kuala Lumpur and has let the said six units of premises to the plaintiff (collectively "the said premises") and the company and the plaintiff have entered into six tenancy agreements pertaining the tenancies of the said premises on 15 June 2011 and 16 June 2011 respectively (collectively "the said tenancy agreements").

[4] The plaintiff contends that the said tenancy agreements of the said premises are merely the means by which the company could make part payment of the debt allegedly due from the company to the plaintiff. This is clearly seen from the company's letter to the plaintiff dated 4 May 2011 in exh. "EON1" annexed to the plaintiff's 2nd affidavit. The company proposed to settle part of its debt to the plaintiff, by leasing to the plaintiff, the said premises.

[5] The plaintiff further contends that by virtue of the said exh. "EON1" annexed to the plaintiff's second affidavit, the company agreed to pay the outstanding amount due and owing to the plaintiff by way of leasing the said premises to the plaintiff at RM7,500 per month per unit of each five storey building. The said exh. "EON1" also stated that any rental due and owing by the plaintiff to the said company from the said tenancy agreements,

A shall be used to settle the company's debt to the plaintiff, thus the material date is 4 May 2011 which is the date of the said exh. "EON1" and not either 15 June 2011 or 16 June 2011 respectively which are the dates of the said tenancy agreements.

B **[6]** The defendant in turn contends that since the said tenancy agreements are dated either on 15 June 2011 and 16 May 2011 respectively, these are material dates and that the said tenancy agreements were entered into within six months before the commencement of the winding up of the Company which is on C 13 December 2011 thus is caught by s. 53 of the Bankruptcy Act 1967 read together with s. 293 of the Companies Act 1965.

Consideration Of The Defendant's Counterclaim

[7] Section 293 of the Companies Act 1965 states as follows:

D

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like E *manner.*

(2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be:

F (a) in the case of a winding up by the Court -

(i) the date of the presentation of the petition; or

(ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding G up the date upon which the resolution to wind up the company voluntarily, is passed,

whichever is the earlier; and

(b) in the case of a voluntary winding up the date upon which H the winding up is deemed by this Act to have commenced. (emphasis added)

[8] Section 53(1) of the Bankruptcy Act 1967 states as follows:

I (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay

his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Director General of Insolvency."

[9] Section 219(2) of the Companies Act 1965 states as follows:

(2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

[10] In *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557, Edgar Joseph Jr FCJ held *inter alia* as follows:

[1] The court has no power to set aside payments and transfers made (in the run-up to bankruptcy) in favour of a particular creditor (which were designed to prefer him over other creditors) *unless the liquidator can satisfy the court that: (i) the transaction took place within six months prior to the commencement of the winding-up; (ii) the transaction was one described in s. 53(1) of the BA; (iii) the transaction took place at a time when the company was insolvent; (iv) the transaction was effected in favour of a creditor of the company; and (v) the transaction conferred on that creditor a preference, priority or advantage over other creditors in the winding-up.*

[1a] The principle underlying s. 293(1) of the CA is that where a debtor company has, at a relevant time, given a preference to any person, the liquidator may apply under that section to have the preference set aside. The object of the rules of bankruptcy as to fraudulent preferences is to prevent a creditor from obtaining for himself an unfair advantage at the expense of the other creditors by concluding a transaction with the company during the twilight period preceding the winding-up of the company.

[1b] In the present case, the relevant time for determining whether the liquidator had satisfied the five conditions was not the date of the setoff, ie, 27 March 1990, but the date of the transaction pursuant to which the deposits were paid, ie, 30 December 1988, which was 11 months before the presentation of the winding-up petition on 2 December 1989. The courts below had misdirected themselves in treating the date of the set-off as the relevant time for determining whether there had been a disposition within the terms of s. 223 of the CA.

A [1c] There was no evidence to show that, on the date of the transaction when the deposits passed into the hands of the appellant, the respondent was insolvent or that the parties intended to confer a preference on the appellant. (emphasis added)

B **[11]** In *G & M Aldridge Pty Ltd v. Walsh* [2001] 179 ALR 416, the High Court of Australia dealt *inter alia* with provisions which are similar to our s. 53 Bankruptcy Act 1967 and s. 293 of the Companies Act 1965 and at paras. 29 and 30 of its judgment held as follows:

C [29] In *Ferrier and Knight v. Civil Aviation Authority*, a full Court of the Federal Court of Australia examined the policy considerations underlying the preference provisions of bankruptcy laws in a number of common law jurisdictions. The case concerned complexities of running accounts that are not presently relevant. The Full Court, observing that, as in the United States, D and unlike the position in England, Australian preference provisions operate objectively, rather than by preference to the subjective purpose of the debtor, quoted a passage from a 1977 House Committee Report 14 which had, in turn, been cited by the Supreme Court of the United States in *Union Bank v. Wales* in E 1991:

> The purpose of the preference section [of the Bankruptcy Reform Act of 1978] is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged F from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables to work his way out of a difficult financial situation through cooperation with all of his creditors. *Second, and more important, the preference provision* G *facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section – that* H *of equality of distribution.*

[30] The same policy is at work in the Australian legislation. A primary objective is that of securing equality of distribution among creditors of the same class. The pursuit of that objective has the consequential effect of deterring the "race of the courthouse" and I that, in turn, enhances the prospect of enabling debtors to trade out of their difficulties without due and discriminatory risk to creditors.

(emphasis added)

[12] Applying the above principles enunciated in the above cases and statutory provisions to the factual matrix of this case, this Court notes that the parties to the said tenancy agreements did not abide by the rental stated in the letter dated 4 May 2011 ("exh. 'EON1"), as can be seen from the said tenancy agreements of the said premises. Thus this court finds that the relevant date for purpose of determining whether the payment or the said tenancy agreements constitute undue preference cannot be on 4 May 2011. This court is of the view that since the said tenancy agreements of the said premises are the means pursuant to which part payment of the company's debt to the plaintiff was made, the relevant date is the date of the said tenancy agreements of the said premises which is also the date when the payment is deemed to be made.

[13] Thus this court finds that the payment of the debt by the company to the plaintiff by way of entering into the said tenancy agreements for the purpose of paying part of the company's debts to the plaintiff is void as undue preference, as the date of execution of the said tenancy agreements of the said premises, which is within six months of the date of filing of the winding up petition against the company. Further the company is without doubt unable to pay its debts as they fall due and is insolvent as at June 2011.

[14] This court finds that the said tenancy agreements are clearly transactions pursuant to which the company sought to repay part of its debt to the plaintiff and this occurred on 15 June 2011 and 16 June 2011 respectively (which are dates of the said tenancy agreements), which is less than six months prior to the commencement of winding up of the company. At that material time, this court finds that the company was insolvent, as evidenced from its audited accounts for the year 2010. Exhibit "A5" which is a copy of the 2010 balance sheet of the company extracted from the audited accounts of the company for 2010. Exhibit "A4" is the audited accounts of the company and at p. 6 of the said audited accounts, it showed that the company had incurred a net loss of RM5,754,529 during the year ended 30 September 2010 and as of that date, the company's current liabilities exceeded its current assets by RM27,401,986, thereby indicating the existence of a material uncertainty which may cast grave doubt about the company's ability to continue, as a going concern.

[15] In its letter dated 28 May 2013, the plaintiff also contends that it had an option to purchase the said premises which it was trying to locate. The plaintiff however never forwarded any option to purchase the premises prior to filing the proceedings herein.

[16] In the light of this court's above findings, this court grants an order pursuant to s. 293 of the Companies Act 1965 read together with s. 53 of the Bankruptcy Act 1967 that the said tenancy agreements between the plaintiff and the company and/or the payments made or deemed made by the company to the plaintiff pursuant thereto, be declared void as against the liquidator of the company with costs.

[17] In the circumstances of this case, this court is minded to grant the orders sought by the defendant herein even though the orders are not the actual prayed for by the defendant in his counterclaim and this court is guided by the case of *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761, the Federal court held *inter alia* as follows:

> We propose to make certain orders later, and it will be seen that these orders will be the orders that the justice of this case requires but may not be the orders actually in terms and prayed for at the end of the statement of claim of the assignee, but we bear in mind that the Court can grant any relief as required by the justice of the case so long as such relief is not inconsistent with the reliefs that are expressly asked for; see *Cargill v. Bower* (1879) 10 Ch D 502).

Order

[18] In the premises, this court orders as follows:

(a) That the plaintiff pay and return the sum of RM1,446,700.02 to the defendant within seven days from the date hereof;

(b) That the plaintiff do deliver up vacant possession of the said premises to the defendant within seven days of the date hereof; and

(c) Costs of RM6,500.